COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 047842-00**

Brian Anastasio	Employee
Perini Kiewit Cashman	Employer
National Union Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Fabricant)

APPEARANCES
James S. Aven, Esq., for the employee
Mark H. Likoff, Esq., for the insurer

HORAN, J. The employee appeals the denial of his claim for permanent and total incapacity benefits.[1] He argues the administrative judge's findings are insufficient to support the denial in light of the credited lay and medical evidence. We agree, and recommit the case for further findings. See G. L. c. 152, § 11C.

On December 4, 2000, the employee fell approximately fourteen feet at work, injuring his right shoulder and left knee.[2] (Dec. 4.) The judge adopted the § 11A examiner's opinion that the employee was unable to return to his lifelong job as a carpenter, but could, with medical restrictions, perform lighter work. The restrictions required the employee to avoid repetitive overuse of his right dominant extremity in a posture greater than one hundred degrees, climbing ladders, and forcible pushing with his right arm. (Dec. 6.) The judge also credited the impartial physician's opinion that "the employee's chronic pain was consistent

[1] The judge did award a closed period of total incapacity benefits, and continuing partial incapacity benefits. (Dec. 4.)

[2] The medical evidence indicated the employee sustained a complete tear of his right rotator cuff, underwent surgical repair on February 20, 2001, and a closed manipulation under general anesthesia for adhesive capsulitis on June 18, 2001. He then required two years of physical therapy. The knee injury resulted in surgical repair of the prepatellar bursa, but the impartial physician opined the employee's knee condition had returned to its pre-injury baseline condition. (Dec. 5-6.)

with right shoulder injuries and the subsequent surgical procedures." (Dec. 6.) Additional subsidiary findings reveal the employee's age (sixty-three), education and training (twelfth grade trade school), and work experience (carpenter since 1967). (Dec. 4.) His average weekly wage was $1,288.12. (Dec. 2.)

The judge credited testimony by the insurer's vocational expert, who had prepared a labor market survey. She opined the employee's medical restrictions[3] permitted him to work "as a gate guard, parking lot attendant or cashier." (Dec. 7.) The expert did concede, and the judge noted, that the employee's inability to drive a standard shift automobile would "eliminate some of the parking attendants [sic] jobs" noted in the labor market survey. (Dec. 7-8.) Nevertheless, the judge concluded: "[a]lthough there is no evidence that the employee has any particular clerical or computer skills, I find the employee could have return [sic] to work within the limitations imposed . . . ." (Dec. 9.) He assigned the employee an earning capacity of $322.03 as of the date of the § 11A examiner's deposition. (Dec. 9-11.) See Sanchez v. City of Boston, 11 Mass. Workers' Comp. Rep. 235, 237 (1997).

While faithful to the evidence, the decision lacks the requisite personal analysis to support the assignment of an earning capacity. On appeal, "we should be able to look at . . . subsidiary findings of fact and clearly understand the logic behind the judge's ultimate conclusion." Crowell v. New Penn Motor Express, 7

[3] It is unclear from the decision whether the vocational expert acknowledged the employee's chronic pain, which required Mr. Anastasio to take Oxycontin until its side effects became intolerable. The judge noted the employee took "Extra Strength Tylenol, four times a day, for his shoulder pain." (Dec. 5.) He adopted the impartial physician's opinion that the employee suffers from chronic pain. (Dec. 6.) It is unclear whether the *judge* independently credits the employee's chronic pain, or whether he simply acknowledges that the *doctor* credited the employee's pain to ascertain the extent of the employee's disability. Certainly, a judge may credit an employee's pain when contemplating the extent of his incapacity. Tremblay v. Art Cement Products Co., Inc., 13 Mass. Worker's Comp. Rep. 236, 239 (1999). A judge may then utilize a finding of chronic pain to support an award of total incapacity benefits when the medical evidence supports only a partial disability. Anderson v. Anderson Motor Lines, Inc., 4 Mass. Worker's Comp. Rep. 65, 67 (1990).

Mass. Worker's Comp. Rep. 3, 4 (1993). A mere recitation of the vocational factors in Frennier's Case, 318 Mass. 635 (1945), is insufficient. The judge must "briefly analyze how these elements combine to justify the earning capacity assignment." Russell v. Micron Eng'g., 12 Mass. Workers' Comp. Rep. 183, 185 (1998). Cf. Fuentes v. Fries Towing, 19 Mass. Worker's Comp. Rep. ___ (April 4, 2005)(judge properly assessed the employee's claim by considering his medical condition, pain, work history, age, education, and communication skills). We cannot determine whether the judge conducted an appropriate individualized assessment of the employee's ability to obtain and retain remunerative work of a substantial and non-trifling nature. See Frennier, supra at 639. This is particularly so given the judge's subsidiary findings regarding the employee's physical restrictions, lack of clerical and computer skills, advanced age, high average weekly wage, and his inability to return to the work he had performed for the preceding thirty-six years.

Accordingly, we recommit the case for further findings of fact consistent with this opinion. We otherwise affirm the decision.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: May 11, 2005